

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**Civil Writ Jurisdiction Case No.14527 of 2010**

1. M/S Shiva Poly Tubes Pvt. Ltd., A Company Incorporated Under The Provisions Of The Companies Act, 1956 Having Its office At 307, Narayan Plaza, Exhibition Road, Patna Through One Of Its Directors, Vishal Kumar Mishra, S/O Late Awadheshwar Prasad Mishra, R/O A-307, Bansal Tower, R.K. Bhattacharya Road, P.S.- Gandhi Maidan, Distt.- Patna

.... .... Petitioner/s

Versus

1. The State Of Bihar Through The principal Secretary (Energy) 3rd Secretariat, Harding Road, Patna  
2. The Bihar Electricity Regulatory Commission (Berc) Vidhyut Bhawan-I, Bailey Road, Patna Through Its Chairman  
3. The Bihar State Electricity Board (Bseb) Vidhyut Bhawan, Bailey Road, Patna Through Its Chairman  
4. The Chief Engineer (Commercial) Bihar State Electricity Board (Bseb), Vidhyut Bhawan, Bailey Road, Patna  
5. The Electrical Executive Engineer (Commercial & Revenue Division), Patna Electrical Circle, Patna  
6. The Assistant Electrical Engineer (Commercial & Revenue Division), Patna Electrical Circle, Patna

.... .... Respondent/s

with

**Civil Writ Jurisdiction Case No.14801 of 2010**

1. M/S Patliputra Gases Limited, Abdul Rehmanpur Road, Didarganj, Patna City, Distt.- Patna Through Its Director Prashant Bhartiya S/O Shri Raj Kumar Bhartiya R/O Langorgali, Hajiganj, P.O. And P.S.- Chouk, Distt.- Patna

.... .... Petitioner/s

Versus

1. The Bihar State Electricity Board, Vidhyut Bhawan, Bailey Road, Patna, Through Its Chairman  
2. Bihar Electricity Regulatory Commission Having Its Office At Vidhyut Bhawan-I, Bailey Road, Patna, Through Its Secretary  
3. The Finance Controller (Revenue) Bihar State Electricity Board, Vidhyut Bhawan, Bailey Road, Patna  
4. The Chief Engineer (Commercial) Bihar State Electricity Board, Vidhyut Bhawan, Bailey Road, Patna

.... .... Respondent/s

with

**Civil Writ Jurisdiction Case No.14795 of 2010**

1. M/S Bihar Industries Association, Sinha Library Road, Patna, Through Its Secretary Anil Kumar Sinha S/O Sri Ramji Prasad Srivastava R/O Mohalla- Mainpura, P.S.- Buddha Colony, Town & Distt.- Patna

.... .... Petitioner/s

Versus

1. The Bihar State Electricity Board, Vidhyut Bhawan, Bailey Road, Patna, Through Its Chairman  
2. Bihar Electricity Regulatory Commission, Having Its Office At Vidhyut Bhawan-I, Bailey Road, Patna, Through Its Secretary

3. The Finance Controller (Revenue) Bihar State Electricity Board, Vidhyut Bhawan, Bailey Road, Patna

4. The Chief Engineer (Commercial), Bihar State Electricity Board, Vidhyut Bhawan, Bailey Road, Patna .... Respondent/s

with

**Civil Writ Jurisdiction Case No.14905 of 2010**

1. M/S Balmukund Concast Limited, Having Its Registered Office At 108, Kalyani Complex, Exhibition Road, Patna-800001 Through Its Managing Director Ajay Kumar Jhunjunwala S/O Late Lok Nath Jhunjunwala

.... Petitioner/s

Versus

1. The State Of Bihar Through The Principal Secretary (Energy) 3rd Secretariat, Harding Road, Patna

2. The Bihar Electricity Regulatory Commission (Berc) Vidhyut Bhawan-I, Bailey Road, Patna Through Its Chairman

3. The Bihar State Electricity Board (Bseb) Vidhyut Bhawan, Bailey Road, Patna Through Its Chairman

4. The Chief Engineer (Commercial) Bihar State Electricity Board (Bseb), Vidhyut Bhawan, Bailey Road, Patna

5. The Electrical Executive Engineer (Commercial & Revenue Division), Patna Electrical Circle, Patna

6. The Assistant Electrical Engineer (Commercial & Revenue Division), Patna Electrical Circle, Patna .... Respondent/s

with

**Civil Writ Jurisdiction Case No.14556 of 2010**

1. M/S Patwari Udyog, A Partnership Firm Having Its Place Of Business At D-7, Industrial Area, Patliputra, Patna Through One Of Its Partners, Subash Kumar Patwari S/O Late Satya Narayan Patwari R/O Road No.-6a, Rajendra Nagar, P.S.- Kadamkuan, Distt.- Patna .... Petitioner/s

Versus

1. The State Of Bihar Through The Principal Secretary (Energy) 3rd Secretariat, Harding Road, Patna

2. The Bihar Electricity Regulatory Commission (Berc) Vidhyut Bhawan-I, Bailey Road, Patna Through Its Chairman

3. The Bihar State Electricity Board (Bseb) Vidhyut Bhawan, Bailey Road, Patna Through Its Chairman

4. The Chief Engineer (Commercial) Bihar State Electricity Board (Bseb), Vidhyut Bhawan, Bailey Road, Patna

5. The Electrical Executive Engineer (Revenue) Pesu, West Circle, Patliputra Division, Patna

6. The Assistant Electrical Engineer (Revenue), Pesu West Circle, Patliputra Division, Patna .... Respondent/s

with

**Civil Writ Jurisdiction Case No.8053 of 2011**

M/S Kalyanpur Cements Ltd.

.... Petitioner/s

Versus



1. The Bihar State Electricity Board, Vidhyut Bhawan, Bailey Road, Patna Through Its Chairman
2. The Bihar Electricity Regulatory Commission Vidhyut Bhawan- Ii, Bailey Road, Patna, Through Its Chairman.
3. The Chief Engineer, Bihar State Electricity Board, Vidhyut Bhawan, Bailey Road, Patna.
4. The Financial Controller, Bihar State Electricity Board, Vidhyut Bhawan, Bailey Road, Patna.
5. The Electrical Superintending Engineer, Bihar State Electricity Board, Transmission Circle, Dehri On Sone, Rohtas.
6. The Accounts Officer, Transmission Circle, Dehari On Sone, Bihar State Electricity Board, Dehri On Sone, Rohtas. .... Respondent/s

**Appearance**

**(In CWJC No.14527 of 2010)**

For the Petitioner/s : Mr. S.D.Sanjay, Advocate

For the Respondent/s : Mr. (GA4)

**(In CWJC No.14801 of 2010)**

For the Petitioner/s : Mr. Suraj Samdarshi, Advocate

For the Respondent/s : Mr.Sree Nandan Prasad Singh, Advocate  
Mr. Anand Kumar Ojha, Advocate

**(In CWJC No.14795 of 2010)**

For the Petitioner/s : Mr. Suraj Samdarshi, Advocate

For the Respondent/s : Mr.Sree Nandan Prasad Singh, Advocate  
Mr. Anand Kumar Ojha, Advocate

**(In CWJC No.14905 of 2010)**

For the Petitioner/s : Mr. Y.G. Giri, Sr. Advocate  
Mr. Raju Giri, Advocate

For the Respondent/s : Mr.Sree Nandan Prasad Singh, Advocate  
Mr. Anand Kumar Ojha, Advocate

**(In CWJC No.14556 of 2010)**

For the Petitioner/s : Mr. S.D.Sanjay

For the Respondent/s : Mr.Sree Nandan Prasad Singh, Advocate  
Mr. Anand Kumar Ojha, Advocate

**(In CWJC No.8053 of 2011)**

For the Petitioner/s : Mr. Mr. Satyadarshi Sanjay

For the Respondent/s : Mr.Sree Nandan Prasad Singh, Advocate  
Mr. Anand Kumar Ojha, Advocate

**CORAM: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH**  
ORAL ORDER

24 27-03-2012 The issues involved and the reliefs sought in these writ applications are similar, as such they have been heard together and are being disposed of by this common order.

All the writ petitioners except the petitioner M/s Bihar

Industries Association in C.W.J.C. No.14795 of 2010 are companies incorporated under the Companies Act, 1956. They are engaged in different business ranging from manufacture of Iron rods to production of UPVC Pipes and Filters.

The main argument has been advanced in C.W.J.C.No.14905 of 2010 (M/s Balmukund Concast Limited Vs State of Bihar & Ors), as such I am taking up this case. The reliefs sought is as follows:

“1.(i) To issue an appropriate writ/order/ direction in the nature of Certiorari for quashing the order dated 30.03.2010 passed by the Respondent- Bihar Electricity Regulatory Commission (BERC), Patna in Case FPPCA No.1/10 by which it has without inviting objection and without hearing to the affected customers have permitted the Bihar State Electricity Board (BSEB) to recover Fuel & power Purchase Cost Adjustment (FPPCA) (also known as Fuel Surcharge) provisionally at the rate of 69 paise per unit for the period October, 2008 to March, 2009 subject to Final Adjustment of Audit (as contained in Annexure-5)

(ii) To issue an appropriate writ/order/direction in the nature of Certiorari for quashing the Order dated 19.05.2010 passed by the Respondent-Bihar Electricity Regulatory Commission (BERC), Patna in Cases FPPCA No.2 of 2010 by which it has without inviting objection and without hearing to the affected customers have permitted the Bihar State Electricity Board (BSEB) to recover Fuel & Power Purchase Cost Adjustment (FPPCA) (Fuel Surcharge) provisionally at the rate of 69 paise per unit for the period April, 2009 to September, 2009 subject to Final Adjustment of Audit (as contained in Annexure-5A).

(iii) To issue an appropriate writ/order/direction in the nature of Certiorari for quashing the letter no.625

dated 09.07.2010 issued by the Respondent no.4- Chief Engineer (Commercial), Bihar State Electricity Board (BSEB), Patna by which he has directed the Circle Authorities of the Supply Circle to raise additional bill on account of Fuel & Power Purchase Cost Adjustment (FPPCA) (Fuel Surcharge) (as contained in Annexure-3).

(iv) To issue an appropriate writ/order/direction in the nature of Certiorari for quashing the Additional Bill dated 06.08.2010 raised against the Petitioner Company on account of "Fuel Power Purchase Cost Adjustment" (FPPCA) along with a Letter No.630 dated 06.08.2010 (as contained in Annexure-4, 4A)

(v) To issue an appropriate writ/order/direction, restraining the Respondent- Bihar State Electricity Board (BSEB) and its officials from taking any measure much less coercive measure against the Petitioner Company for realization of the amount of Fuel & Power Purchase Cost Adjustment (FPPCA) until the issue of levy of Fuel & Power Purchase Cost Adjustment (FPPCA) is finally determined in accordance with law".

The petitioner of C.W.J.C. No.14905 of 2010 (M/s Balmukund Concast Limited) is engaged in manufacture of Iron rods and has induction furnace and Rolling Mill at Mahadeopur, Phulwari, Bihta in the town and District of Patna. The petitioner is a consumer of Bihar State Electricity Board (in short 'the BSEB') and comes under the HTSS-II category of consumer having connection No.BT/3540, having contract demand/connection of 12141 KVA.

I.A.No.10648 of 2010 was filed seeking amendment in

the relief portions. In the amendment petition, the petitioner sought quashing of letter no.1309 dated 16.12.2010 and other letters issued by the officers of the BSEB, for recovering Fuel Power Purchase Cost Adjustment charges commonly known as fuel surcharge @ 69 paise per unit on actual energy consumption for different periods of 2009-10 in terms of order dated 30.3.2010 passed in Case No. FPPCA 01/10 and order dated 19.5.2010 passed in FPPCA 02/10 by Bihar State Regulatory Commission (in short 'BERC'), Further more, I.A. No. 4322 of 2011 was filed on 1.7.2011 with a prayer to command the respondent BERC to direct the BSEB to produce the audited annual accounts of the financial year 2008-09 and 2009-10 and then on the basis of the said account may determine the rate at which the fuel and Power Purchase Cost Adjustment (FPPCA) can be levied for the period October 2008 to March, 2009 and April, 2009 to September, 2009.

Before I take up the issues involved, it will be appropriate to notice the facts and relevant provisions of law. Section 82 of the Bihar Electricity Act (hereinafter referred to as 'the Act') provides for constitution of Bihar State Regulatory Commission. Section 86(1)(a) of the Act enjoins BERC to discharge the functions of determining the tariff for generation, supply,

transmission and billing of electricity wholesale or bulk or retail, as the case may be, within the State. Section 61 of the Act provides for Tariff Regulations and its terms and conditions for determination of tariff and factors, which would guide such determination. Section 64(3) of the Act states that before issuing Tariff Order, the BERC would duly consider the suggestion/objection made in respect to it.

The BERC in exercise of its power conferred under sections 61 and 62 of the Act framed the Bihar State Electricity Regulatory Commission (Terms & Conditions for Determination of Tariff Regulation) Tarrif, 2007 which lays down the procedures for determination of the tariff. The BERC in exercise of its power under section 62(1)(d) read with sections 62(3) and 64(3) of the Act issued first Tariff Order which was made effective from 1.11.2006. Thereafter, the BERC issued the Tariff Order dated 26.8.2008 for determination of Retail Tariff for the financial year 2008-09 for supply of electricity to the consumers in the State of Bihar.

The BSEB filed a petition before the BERC for approval of FPPCA for the periods October, 2008 to March, 2009 and April 2009 to September, 2009 which were registered as FPPCA Case No.01/10 and 02/10 respectively mainly on account of increase in

price of imported coal used by the N.T.P.C. at its Farakka, Kahalgaon, Talchar Thermal Power Stations. In terms of FPPCA formula stipulated in Tariff Order dated 26.8.2008 for the years 2008-09, the BSEB sought approval for levy of FPPCA @ 69 paise per unit to its consumer except for agriculture and consumers using Kutir Jyoti. The BSEB further sought levy of FPPCA @ 126 per KW for increase in coal price imported by the N.T.P.C. for supply of electricity to the BSEB. The BERC provisionally worked out the fuel and Power Purchase Cost Adjustment charges at Rs.173.97 crores on account of changes in power purchase and fuel cost. The BERC allowed BSEB to recover FPPCA charge provisionally @ 69 paise per unit on the energy consumption for the period October, 2008 to March, 2009 subject to final adjustment on annual accounts of the BSEB for the year 2008-09. The BERC worked out the power purchase adjustment cost at Rs.210.80 cores on account of changes in power purchase and fuel cost during the period April 2009 to September, 2009 with respect to approved cost and allowed the BSEB to recover FPPCA charges provisionally (fuel surcharge @ 69 paise per unit on energy consumption except consumers of Kutir Jyoti/BPL and private agriculture consumers also subject to final adjustment on audit of annual accounts of the BSEB for the



year 2009-10. Consequent to the sanction of the additional fuel surcharge @ 69 paise per unit contained in Annexure-5 and 5/A, the Chief Engineer (Commercial), BSEB(Respondent no.4) directed the circle authorities of Supply Circle to raise additional bill on account of FPPCA (fuel surcharge) as contained in Annexure-3. The additional bill dated 6.8.2010 is impugned in Annexure-4. The bills raised for the subsequent period including addition of 69 paise per unit for different periods have been annexed and challenged in the amendment petitions.

The petitioner has challenged the order of the BEREC approving increase in fuel surcharge @ 69 paise per unit in its order dated 30.3.2010 passed in FPPCA No. 01/10 and order dated 19.5.2010 passed in FPPCA Case No.02/10 on the ground that before determining the fuel surcharge no opportunity of hearing was provided which is necessary in view of section 64(3) of the Act. In short, the contention was that BEREC cannot make modification in the tariff without inviting objections from the consumers by giving public notice. They stated that it was incumbent upon the BEREC to ensure as to whether the data submitted by the BSEB was genuine and adequate for calculating the fuel and power purchase cost. It was further stated that the BEREC did not adhere to the conditions imposed in the formula

before approving levy of 69 paise per unit as fuel surcharge for the two periods in question.

On the other hand, both BERC and the BSEB have filed counter affidavits. The BERC stated that order passed for recovering fuel and power purchase cost adjustment charges provisionally @ 69 paise per unit on 30.3.2010 and 19.5.2010 are based on FPPCA formula as specified in the Tariff Order dated 26.8.2008 of BERC prepared under section 62(4) of the Electricity Act, 2003 and is in accordance with the Tariff Regulation, 2007. The BERC submits that the formula specified for FPPCA charges in its Tariff Order dated 29.11.2006 has not been struck down by any court. Further more, the formula for levying FPPCA in Tariff order dated 26.8.2008 for the year 2008-09 has also been upheld by the Appellate Tribunal Electricity, New Delhi. The BERC on the basis of parameters approved in the Tariff Order dated 26.8.2008 has worked out the extra cost of generation of Barauni Thermal Power Station and on that account an adjustment of Rs.2.31 cores in order dated 30.3.2010 and Rs.3.76 cores in order dated 19.5.2010 have been passed on to the consumers. The provision for realization of FPPCA charges was provided in the Tariff Order itself and before notification of Tariff Order, public objections, suggestions, comments were

invited through leading newspapers. The petitioner challenged the Tariff order before the APTEL in Appeal No.128/08 which was dismissed vide order dated 12.2.2009. It has been stated that the formula and its application is part of the Tariff Order and embedded in the Tariff Order itself.

Both counsels for the BERC and BSEB submitted that the Bihar Steel Manufacturers Association unsuccessfully challenged the order dated 30.3.2010 and 19.5.2010 approving levying of additional amount of 69 paise per unit provisionally vide Appeal No.172 of 2010, which was dismissed.

In I.A. No.4322 of 2011, the petitioner seeks a direction commanding the BERC to direct the BSEB to produce audited annual accounts for the year 2008-09 and then on the basis of said account may determine the final rate at which fuel and power purchase cost can be levied for the period October, 2008 to March, 2009 and April, 2009 to September, 2009. On the date of earlier hearing, counsel for the BERC stated that as they have received the audited accounts for the period October, 2008 to March, 2009 and April, 2009 to September, 2009, the BERC would proceed to determine the final elements of fuel surcharge for the periods in question. Subsequently, the BERC on receipt of final audited accounts of the BSEB has determined the final

elements of fuel surcharge. The final decision of the BERC for the period October, 2008 to March, 2009 have been brought on record through 3<sup>rd</sup> Supplementary Affidavit dated 30.1.2012 and that for the period April, 2009 to September, 2009 vide 4<sup>th</sup> Supplementary Affidavit dated 21.2.2012.

The petitioners state that final determination of the BERC would show that the cost worked out for the relevant period was much less as worked out in the provisional estimate contained in Annexures-5 and 5/A. The case of petitioners is that final determination of cost of fuel surcharge is faulty and in violation of the provisions of both Electricity Act, 2003, Bihar Electricity Regulatory Commission (Terms & Conditions for Determination of Tariff Regulation), Tariff, 2007 and principle of natural justice. On the other hand, counsel for the BERC submits that after providing all adjustments the annual revenue requirement for the period in question had in fact been found to be more than what was estimated in Annexures-5 and 5/A.

In case the petitioners are aggrieved by the final determination of cost of fuel surcharge for the two periods in question i.e. October, 2008 to March, 2009 and April, 2009 to September, 2009, it would be open for them to move the Appellate Tribunal, New Delhi, under section 111 of the

Electricity Act, 2003.

So far the grievance of the petitioners that BERC has not worked out final elements regarding determination of cost per unit of consumption for the two periods, I find that the final figure of fuel cost consequent to increase in import price of coal, etc. has already been determined and copy of the same has been brought on record in third and fourth supplementary affidavit to this application. The respondents should determine the cost of fuel surcharge per unit which was provisionally estimated at 69 paise per unit within three months from the date of receipt of copy of the order. Any extra payment or short fall in payment accruing consequent to final determination of cost per unit would be adjusted or added, as the case may be.

These writ applications are accordingly disposed of in terms of aforesaid liberty and directions contained thereof.

**(Samarendra Pratap Singh, J)**

**Md. Jamaluddin Khan**  
**A.F.R.**